

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

**On Appeal from the Court of Appeals
The Honorable Patrick M. Meter, The Honorable
Karen M. Fort Hood, and The Honorable Bill Schuette, presiding**

**THE GREATER BIBLE WAY
TEMPLE OF JACKSON**, a Michigan
ecclesiastical corporation,

Plaintiff/Appellee,

v.

**CITY OF JACKSON, JACKSON
PLANNING COMMISSION, and
JACKSON CITY COUNCIL**

Defendants/Appellants.

**Supreme Court No. 130196
Court of Appeal No. 255966
Lower Court No. 01-003614-AS**

APPELLANT CITY OF JACKSON'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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Dated: September 5, 2006

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STATEMENT OF QUESTIONS INVOLVED

- I. Whether the trial court and Court of Appeals erred in finding that Plaintiff-Appellee, Greater Bible Way Temple of Jackson, did not waive its claim for attorney fees and costs by failing to formally request or amend its pleadings to request attorney fees and costs and whether the trial court and Court of Appeals erred in finding that Defendant-Appellant City of Jackson has not been substantially prejudiced by such failure.

The Circuit Court said "No."

The Court of Appeals said "No."

Appellee says "No."

Appellant City says "Yes."

This Court should say "Yes."

INTRODUCTION

Defendant-Appellant, City of Jackson ("City") will rely on the statement of facts in its brief on appeal in this case, as well as that filed in the companion Case Number 130194 for the factual history of this matter.

The present case addresses the trial court's error in awarding Plaintiff-Appellee Greater Bible Way Temple ("GBW") attorney fees and costs even though GBW failed to properly request such fees. It is the City's position that because GBW failed to amend its pleadings to request such fees and failed to otherwise timely request such fee, GBW waived any award of such fees. In its opinion in this matter, the Court of Appeals relied exclusively on MCR 2.601 to find that in the final judgment, the trial court could grant any relief it felt necessary, even if the party had not demanded that relief in its pleadings. Such a finding is much too broad and does not take into account the circumstances of this case. Accordingly, the City asks that this Honorable Court reverse the decision of the trial court and the Court of Appeals.

REPLY ARGUMENT

The trial court and Court of Appeals did err in finding that GBW did not waive its claim for attorney fees in this matter. The issue of attorney fees was raised through the course of the proceedings and GBW failed to amend its pleadings to request attorney fees and costs and failed to otherwise address the issue before a final order being entered. The City was prejudiced by GBW's late request for attorney fees and the trial court's granting of such fees.

GBW has misinterpreted the City's argument in this matter. The City's argument concerning GBW's waiver of attorney fees and costs is not limited to the narrow issue of whether GBW requested attorney fees and costs in its complaint. GBW leaves out of its analysis of this issue the significantly relevant fact that during the two-day trial conducted on July 14 and July 15, 2003, the trial court questioned whether GBW was making a claim for attorney fees under 42 USC 1988. Likewise, GBW leaves out of its analysis any reference to the fact that the parties went through

several drafts of a final order in this matter, none of which made any reference to a claim for attorney fees.

The Civil Rights Attorneys' Fee Act, 42 USC 1988, authorizes a court to award a reasonable attorney fee to a prevailing party in a civil rights action, including litigation brought under RLUIPA. Section 1988 states:

In any action or proceeding brought to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318 . . . the Religious Land Use and Institutionalized Persons Act of 2000 . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

This statute does not allow for an award of attorney fees as a matter of right, but instead provides for an attorney fee at the discretion of the court.

A waiver is a voluntary and intentional abandonment of a known right.¹ A claim or defense may be waived where a party fails to timely make said claim or defense. In this case, there is no doubt that GBW had the right to request attorney fees. The question is whether GBW waived that right to request attorney fees by failing to make the request sooner than it did in this case.

In this case, while GBW did request attorney fees in a post-judgment motion, the trial court and Court of Appeals should have found the request to be untimely under the circumstances. Here, the trial court previously raised the issue of whether there was a request for attorney fees, and GBW failed to specifically request attorney fees. GBW should have at that time made the request for attorney fees if it was in fact going to request attorney fees. Thereafter, the trial court was at a loss as to what remedy to grant and the court specifically directed GBW's counsel to prepare an order. The parties went through several drafts of orders, during which time GBW never raised the issue of

¹ See *Quality Products & Concepts v Nagel Precision, Inc.*, 469 Mich 362; 666 NW2d 251 (2003).

attorney fees. GBW made no mention of a request for attorney fees under RLUIPA until after the “final order” was entered.

Regardless of whether the attorney fees in this case were required to be specifically pleaded, the end result is that GBW waived any award of attorney fees. GBW’s failure to specifically request or even mention attorney fees at the time the court raised the issue and later in the proposed orders should bar it from untimely raising the issue after the court entered the “final order” in the matter.

While the City was aware that the present action was brought, in part, under RLUIPA, an award of attorney fees is not mandatory. Here, the City was prejudiced by GBW’s late request for attorney fees. Again, the trial court noted its confusion with regard to the relief being requested and specifically mentioned that the court did not know whether attorney fees were being requested.² GBW had the obligation at that time to state that it was requesting attorney fees if found to be a prevailing party. GBW also had the obligation to at least reserve the issue of attorney fees in the final orders that were presented. GBW did not file a motion for attorney fees after the first final order was entered on July 29, 2003. Thereafter, the City filed a motion for relief from judgment and several hearings were held, at which GBW never mentioned a request for attorney fees.³ Based on GBW’s conduct and complete failure to address the attorney fee issue, the City was led to believe that attorney fees were not being requested.

Under the circumstances, the trial court should have determined that GBW failed to timely request attorney fees and thus waived any award of attorney fees under RLUIPA. The trial court abused its discretion when it awarded GBW attorney fees. The Court of Appeals gave this issue little thought in its opinion and exclusively relied on MCR 2.601(A) to find that the trial court could grant an award of attorney fees. Such court rule is inapplicable in this case. Accordingly, the Court of Appeals erred in affirming the trial court’s award of attorney fees to GBW.

² See Appellants’ Appendix, 812a.

Again, the Court of Appeals relied on MCR 2.601 to find that the trial court could award attorney fees in this matter. MCR 2.601(A) states:

Except as provided in subrule (B), every final judgment may grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded that relief in his or her pleadings.”

GBW correctly notes in its brief that in *City of Jackson v Thompson McCully*, 239 Mich App 482; 608 NW2d 531 (2000), the trial court granted the plaintiff relief on a theory of law that was not in the plaintiff’s complaint. The Court of Appeals in that case thereafter affirmed the trial court’s ruling pursuant to MCR 2.601(A), finding that under the court rules, a final judgment could grant the relief, even if the party had not demanded it in the pleadings.

The instant case is distinguishable from the *Thompson McCully* case. Here, the trial court did not award GBW attorney fees in the final order that determined GBW’s rights. Here, the “final order” made no mention of attorney fees, but instead, GBW requested attorney fees after the last “final order” was entered.⁴ MCR 2.601(A) is simply inapplicable.

The City will not rehash its arguments concerning FRCP 54(c) and the case law addressing same, as this analysis was fully set forth in the City’s brief on appeal. However, the City notes that GBW argues that even though a claim for attorney fees was not specifically pleaded or even mentioned until after the second final judgment, the City knew or should have known that attorney fees could be awarded. The City does not dispute that attorney fees could be awarded in the discretion of the trial court pursuant to 42 USC 1988 if there was a proper timely request for same. However, should the City have been required to know that GBW would be requesting attorney fees after the trial court inquired about the matter and GBW said nothing? Should the City have been required to know that GBW would be requesting attorney fees after it made no mention of attorney

³ See Appellants’ Appendix, 831a-840a.

fees in any of the final orders it drafted? While the City knew that attorney fees could be awarded if properly requested, the City should not be required to know attorney fees could be awarded after GBW waived the right to request or preserve the issue.

Finally, GBW seems to insinuate that the City's "abandonment" of its cite to *United States v Marin*, 651 F2d 24 (1981), shows that the City was not prejudiced by the award of attorney fees in this matter. Such is not the case at all. In *Marin*, the party's complaint did not contain an explicit prayer for damages; however, there was a prayer for "such other and further relief as is equitable in the premises." So, while the complaint did not request a specific amount of damages, it did request any and all relief, which the court could award in the final judgment. The court went on to state that "there may be cases where the failure to ask for particular relief so prejudiced the opposing party that it would be unjust to grant such relief. However, the court found that was not the case because the defendants had ample notice during the course of the proceedings that the receiver claimed a right to recover the differential in the lease and there was ample opportunity to contest that claim.

In the present case, while GBW may have been successful on its RLUIPA claim in the trial court and attorney fees could be awarded, GBW waived its right to request attorney fees by failing to address the issue when the trial court specifically asked about the issue and in failing to raise the issue in the final orders. GBW had ample time to amend its pleadings when the issue was raised or otherwise preserve the issue, but instead, it said and did nothing. Such conduct essentially put the City on notice that GBW was not going to request attorney fees. And the City was prejudiced when GBW later, after the final order was entered, decided to make a claim for attorney fees. Accordingly, the trial court and Court of Appeals erred in awarding GBW attorney fees in this matter.

⁴ As previously addressed, the parties went through several drafts of final orders before *the* final order was entered. None of these draft orders, nor the order that was finally entered mentioned an award of attorney fees or a reservation for attorney fees.


CONCLUSION AND RELIEF REQUESTED


The Court of Appeals erred in relying on MCR 2.601(A) when it affirmed the trial court's award of attorney fees in this matter. Pursuant to FRCP 9(g), GBW was required to specifically request attorney fees in its pleadings. However, not only did GBW fail to request attorney fees in its pleadings, when directly approached with the issue by the trial court, GBW failed to amend its pleadings to request attorney fees or include attorney fees in any draft orders, the first order entered by the trial court, or the "final order" entered by the court. Under the circumstances, the trial court abused its discretion in awarding GBW attorney fees. The circumstances of this case demonstrate that GBW is not entitled to attorney fees, but instead, waived any such award.

WHEREFORE, Defendant-Appellant, the City of Jackson, respectfully requests this Honorable Court reverse the Court of Appeals decision and the trial court's award of attorney fees in this matter.

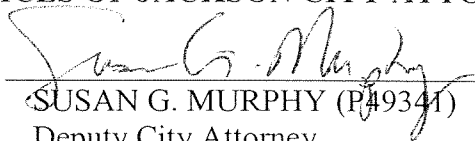
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